

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION ONE

STATE OF WASHINGTON,	)	No. 63276-1-I
	)	
Respondent,	)	
	)	
v.	)	
	)	
KYLE MATTHEW FOX,	)	UNPUBLISHED OPINION
	)	
Appellant.	)	FILED: June 14, 2010
	)	

Ellington, J. — Kyle Fox was convicted of possession of a stolen vehicle. He appeals, alleging ineffective assistance of counsel. We affirm.

BACKGROUND

On November 25, 2008, two Everett police officers responded to a call of a “slumper” in a vehicle.<sup>1</sup> The officers discovered that the car had been stolen two days before from Seattle. Kyle Fox was sleeping in the car. The officers rapped on the window and demanded that Fox exit the car and show his hands. Fox escaped through the rear driver’s side door and ran. He was stopped after about a hundred feet, and after considerable struggle, the officers managed to handcuff him. The car ignition appeared intact and no keys of any kind were discovered in the car or on Fox.

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<sup>1</sup> Report of Proceedings (Feb. 17, 2009) at 151.

Fox was charged with one count of possession of a stolen vehicle. During jury selection, the court asked the prospective jurors if any of them felt they could not be impartial. Juror 29 responded, “I just don’t believe that we’re going to hear everything that happened. I’ve been a police officer, so I probably would be—not be impartial because I know—.”<sup>2</sup> The court then asked the juror whether she could base her decision on the facts as presented in the courtroom. Juror 29 answered, “I think I’d spend more time wondering about the facts that I’m not hearing.”<sup>3</sup> Further questioning established that Juror 29 retired from police work 20 years earlier and that, in her experience, generally “certain things would be ruled out, will not be allowed to be testified to.”<sup>4</sup> She said she would try to follow the jury instructions, but the fact that some evidence is inadmissible is “still going to stick in [her] mind.”<sup>5</sup>

Defense counsel asked that Juror 29 be excused for cause and the prosecutor had no objection. The court excused her, then asked again whether any of the prospective jurors would raise their hand as to its question. No other prospective juror raised his or her hand. Jury selection then continued uneventfully. The State exercised all seven of its peremptory challenges; the defense exercised three.

At trial, the defense argued that Fox was homeless, that he came to Everett from Seattle by bus the night before the events and that he found the car, unlocked, while looking for a place to sleep.

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<sup>2</sup> Id. at 36.

<sup>3</sup> Id.

<sup>4</sup> Id. at 37.

<sup>5</sup> Id.

The jury convicted Fox. The court imposed a prison-based DOSA sentence of 25 months and another 25 months of community custody. Fox appeals.

### DISCUSSION

Fox argues his trial counsel was ineffective. To prevail on a claim of ineffective assistance of counsel, a defendant must show that counsel's performance was deficient, and that the deficient performance prejudiced him.<sup>6</sup> Deficient performance occurs when counsel's performance falls below an objective standard of reasonableness.<sup>7</sup> Prejudice is shown when the defendant establishes, with reasonable probability, that but for counsel's errors the outcome of the proceedings would have been different.<sup>8</sup> The failure to establish either prong of the test is fatal to the claim of ineffective assistance of counsel.<sup>9</sup>

Fox argues that his attorney was ineffective because he failed to move for a mistrial based on Juror 29's answers during jury selection. He claims that Juror 29's revelations that certain evidence may be inadmissible at trial tainted the entire venire and denied him the right to an impartial jury.

The United States and Washington State Constitutions guarantee defendants the right to trial before an impartial jury.<sup>10</sup> Jury selection gives them the opportunity to determine whether any of the prospective jurors would have difficulty returning a fair

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<sup>6</sup> State v. Thomas, 109 Wn.2d 222, 225–26, 743 P.2d 816 (1987).

<sup>7</sup> State v. Stenson, 132 Wn.2d 668, 705, 940 P.2d 1239 (1997).

<sup>8</sup> State v. Leavitt, 111 Wn.2d 66, 72, 758 P.2d 982 (1988).

<sup>9</sup> State v. Fredrick, 45 Wn. App. 916, 923, 729 P.2d 56 (1986).

<sup>10</sup> State v. Davis, 141 Wn.2d 798, 824, 10 P.3d 977 (2000).

and impartial verdict.<sup>11</sup> Here, Juror 29's doubts about her impartiality allowed Fox to successfully challenge her for cause.

It is common knowledge that not all evidence regarding a case is admissible at trial. The court, in fact, instructed the jurors to that effect. The court explicitly asked the jurors to base their verdict only on the admitted evidence and refrain from speculating about the inadmissible evidence:

One of my duties had been to rule on the admissibility of evidence. Do not be concerned during your deliberations about the reasons for my rulings on the evidence. If I have ruled that any evidence is inadmissible, or if I have asked you to disregard any evidence, then you must not discuss that evidence during your deliberations or consider it in reaching your verdict. Do not speculate whether the evidence would have favored one party or the other.<sup>[12]</sup>

Juror 29 did not impart any improper information that could have affected the other prospective jurors' ability to be fair and impartial. Defense counsel was therefore not deficient in failing to move for a mistrial.

Affirmed.

Edmonton, J

WE CONCUR:

Leach, A.C. J.

Cox, J.

<sup>11</sup> State v. Ford, 151 Wn. App. 530, 543–44, 213 P.3d 54 (2009), review granted, 168 Wn.2d 1005, 226 P.3d 781 (2010).

<sup>12</sup> Clerk's Papers at 45–46.

